

Nova Law Review

Volume 18, Issue 2

1994

Article 19

The Florida Board of Bar Examiners: The Constitutional Safeguard Between Attorney Aspirants and the Public

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I. INTRODUCTION

The court, under its constitutional authority to 'regulate the admission of persons to the practice of law,' has the authority to require profi-

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ciency in the law and good moral character before it admits an applicant to practice before the courts of this state. The sole purpose of these requirements is to protect the public.¹

Article V, section 15 of the Florida Constitution vests the Supreme Court of Florida with “exclusive jurisdiction to regulate the admission of persons to the practice of law”² The authority of the Florida Supreme Court to regulate Bar membership is derived from the historical practices of the English courts. Such practices predate the adoption of the Florida Constitution by over six centuries.³

In 1955,⁴ the Supreme Court of Florida established the Florida Board of Bar Examiners (“FBOBE”) pursuant to general statutory and constitutional authority.⁵ As presently constituted, the FBOBE has fifteen members;⁶

1. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 458 (Fla. 1978) [hereinafter *G.W.L.*].

2. FLA. CONST. art. V, §15.

3. In *In re* Fla. Bd. of Bar Examiners, 353 So. 2d 98 (Fla. 1977), the court stated: For more than six centuries prior to the adoption of our Constitution, the English courts exercised the right to determine who should be admitted to the practice of law. This authority was grounded upon the rationale that if the courts and the judicial power were to be regarded as an entity, the power to determine who should be admitted to practice law was a constituent element of that entity. This was so because the quality of justice dispensed by the courts depended in no small degree upon the integrity and competence of its Bar. An unfaithful or incapable Bar could visit reproach upon the administration of justice and upon the courts themselves.

The drafters of the Florida Constitution recognized this inherent right of the courts to regulate the admission of persons to the practice of law, imbuing the Supreme Court with exclusive jurisdiction to direct such admissions.

Id. at 100 (citation omitted).

4. Prior to 1955, regulation of Bar membership was “governed by Chapter 10175, Laws of Florida (1925).” This statute created the Florida Board of Law Examiners. *LaBossiere v. Florida Bd. of Bar Examiners*, 279 So. 2d 288, 289 (Fla. 1973). The statute granted a diploma privilege to graduates of Florida law schools entitling them to a waiver of the Bar examination. *Id.*

5. *Id.* (citing to FLA. CONST. of 1885, art. V, § 23; Ch. 29796, § 1, Laws of Fla. (1955); FLA. STAT. § 454.021(1)). Florida Statutes section 454.021 recognizes the court’s exclusive jurisdiction and states:

(1) Admissions of attorneys and counselors to practice law in the state is hereby declared to be a judicial function.

(2) The Supreme Court of Florida, being the highest court of said state, is the proper court to govern and regulate admissions of attorneys and counselors to practice law in said state.

FLA. STAT. § 454.021 (1991).

twelve members of The Florida Bar,⁷ and three nonlawyer members of the general public,⁸ who are appointed by the court.⁹

Attorney members of the FBOBE serve for five years and public members serve for three years.¹⁰ Members of the FBOBE serve without compensation¹¹ and “devote whatever time is necessary to perform the duties of examiner.”¹²

The FBOBE has its own staff¹³ and maintains its administrative offices in Tallahassee.¹⁴ The FBOBE is granted authority to “compel by subpoena the attendance of witnesses and the production of books, papers, and documents.”¹⁵

The FBOBE’s activities are governed by the Rules of the Florida Supreme Court Relating to Admissions to the Bar.¹⁶ The Florida Supreme Court declared invalid a legislative enactment which attempted to direct the Board to undertake particular responsibilities.¹⁷ The court reasoned: “As

6. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 2.

7. *Id.* Article I, section 3.a. of the Rules of the Florida Supreme Court Relating to Admissions to the Bar, states: “Attorney members shall be practicing attorneys with scholarly attainments and an affirmative interest in legal education and requirements for admission to the Bar.” *Id.* § 3.a.

8. *Id.* § 2.a. Article I, section 3.a. of the Rules of the Florida Supreme Court Relating to Admissions to the Bar, states: “Public members shall be nonlawyers and shall have an academic Bachelor’s Degree. It is desirable that public members possess educational or work-related experience of value to the Board such as educational testing, accounting, statistical analysis, medical or psychologically related sciences.” *Id.* § 3.a. During the 1992-93 term, the public members consisted of a psychiatrist, a certified public accountant and a medical doctor.

9. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 3.

10. *Id.* § 2.

11. *Id.* § 5.

12. *Id.* § 3.c. With a minimum of nine monthly meetings each year along with special hearing panels and the twice yearly administration of the Bar examination, Board members volunteer well in excess of 200 hours each year in the performance of their duties.

13. *Id.* § 9. The Board “is a state agency under the judicial branch of the government and its employees are state employees” *In re Fla. Bd. of Bar Examiners*, 268 So. 2d 371, 372 (Fla. 1972).

14. FLA. SUP. CT. BAR ADMISS. RULE, art. I, § 6.

15. *Id.* art. III, § 3.a.

16. Amendments to the rules are regularly proposed by the Board to the court. On one occasion, a petition to amend a rule provision from an interested third party was considered by the court. Florida Bd. of Bar Examiners *re* Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar, 603 So. 2d 1160 (Fla. 1992).

17. *In re Fla. Bd. of Bar Examiners*, 353 So. 2d at 100. In that case, the Legislature attempted to include the Board in a statute requiring modification of examinations by state agencies to accommodate blind or deaf persons. *Id.* at 99. Although the court declared the

an arm of this [c]ourt, the Board is answerable solely to this tribunal.”¹⁸

II. REQUIREMENTS OF EDUCATION AND EXAMINATION

Commencing in 1955, the Supreme Court of Florida, “in an effort to provide uniform and measurable standards by which to assess the qualifications of applicants, adopted a two-pronged system for the determination of educational fitness”¹⁹ This system required all Bar applicants to graduate from an approved law school and to submit to the Bar examination.²⁰

A. Law Degree

A Bar applicant must possess the degree of Bachelor of Laws or Doctor of Jurisprudence from a law school approved by the American Bar Association (“ABA”).²¹ This has been the sole educational requirement since 1992 when the Florida Supreme Court eliminated the undergraduate degree requirement.²²

In *LaBossiere v. Florida Board of Bar Examiners*,²³ the Supreme Court of Florida affirmed its continuing reliance upon the accreditation of law schools by the ABA as “an objective method of determining the quality of the educational environment of prospective attorneys.”²⁴ The court acknowledged that it was unable to evaluate the many law schools due to “financial limitations and the press of judicial business.”²⁵

statute invalid as it applied to the Board, the court agreed with the commendable purpose of the statute. *Id.* at 100. The court also pointed out “that the Board has for some time given special consideration to the physically handicapped in administering the Bar examination.” *Id.* at 101.

18. *Id.* at 100.

19. *LaBossiere*, 279 So. 2d at 289.

20. *Id.*

21. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 1.a.

22. Florida Bd. of Bar Examiners *re* Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar, 603 So. 2d 1160 (Fla. 1992). The court reasoned: “We note that the majority of other states do not have such a [undergraduate degree] requirement, and we conclude that the disputes over credentials evaluations are expensive, time-consuming, and unnecessary.” *Id.*

23. 279 So. 2d at 288.

24. *Id.* at 289.

25. *Id.* Other states have reached a similar conclusion. The Minnesota Supreme Court has stated: “[w]e have neither the time nor the expertise to investigate individually the special training of an applicant or the program offered by specified law schools, and any

In the landmark decision of *In re Hale*,²⁶ the Florida Supreme Court confronted the issue of the court's prior practice of granting waivers of the accredited law degree requirement.²⁷ After acknowledging that it had only granted nine of the last fifty-five petitions for a waiver, the *Hale* court concluded "that a seeming ad-hoc approach in the granting of waivers bears within it the appearance of discrimination"²⁸ The court then ruled that it "will no longer favorably consider petitions for waiver of section 1.b. [now 1.a.] of the Rule."²⁹

The only exception to the accredited law degree requirement is the submission of a documented abstract of practice by an individual who has actively practiced law in another state or in the federal courts for at least ten years.³⁰ The compilation of work product consists of "samples of the quality of the applicant's work, such as pleadings, briefs, legal memoranda, corporate charters or other working papers which the applicant considers illustrative of such applicant's expertise and academic and legal training"³¹ The FBOBE is granted "broad discretion" in deciding if a submission is sufficient.³²

B. *The Bar Examination*

The Supreme Court of Florida has mandated that "[a]ll individuals who seek the privilege of practicing law in the State of Florida shall submit to the Florida Bar Examination."³³ Florida has no provision for interstate

attempt by us to do so would be inefficient and chaotic." *In re Application of Hansen*, 275 N.W.2d 790, 796 (Minn. 1978), *appeal dismissed sub nom. Hansen v. Minnesota State Bd. of Bar Examiners*, 441 U.S. 938 (1979). The Alaska Supreme Court stated: "The ABA system of accreditation is sophisticated and time-consuming. We can think of no effective substitute which could be developed at the state level without diverting impractical amounts of manpower and money into such an inquiry." *Application of Urie*, 617 P.2d 505, 508 (Alaska 1980) (Footnote omitted).

26. 433 So. 2d 969 (Fla. 1983).

27. *Id.*

28. *Id.* at 971.

29. *Id.* at 972. The court observed that its nonwaiver policy "while conceivably a hardship to some, is in the best interest of the legal profession in our state." *Id.*

30. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 1.b.

31. *Id.*

32. *Id.*

33. *Id.* art. I, § 1. An exception to such requirement appears in *In re Fla. Bd. of Bar Examiners*, 339 So. 2d 637 (Fla. 1976). In that case, the petitioner, Virgil Hawkins, had previously been denied admission to the University of Florida law school during the 1950's because of his race. *Id.* at 638. Based upon consideration of "the totality of circumstances,"

reciprocity as to Bar admissions.

In *In re Russell*,³⁴ petitioner, a member of the Massachusetts Bar and a resident of Florida, attacked Florida's lack of reciprocity as unconstitutional.³⁵ The petitioner was offended by Florida's policy requiring her to submit to an examination testing her knowledge of law even though she was a licensed lawyer in Massachusetts.³⁶

The Supreme Court of Florida in *Russell* found petitioner's argument "utterly devoid of merit."³⁷ The court observed that "the right to practice law in State courts is not a privilege granted under the Federal Constitution."³⁸ The court further held that its Bar examination policy did not violate federal guarantees of due process and equal protection.³⁹

The *Russell* court reaffirmed the intimate connection between the practice of law and the administration of justice. The court thus concluded: "We see it clearly as our duty to admit to this special position of obligation and trust only those applicants, whether from Florida schools or elsewhere, who can satisfactorily demonstrate their credentials through a test of competence given under our supervision and control."⁴⁰

The General Bar Examination is administered by the FBOBE during the last Tuesday and Wednesday of February and July of each year.⁴¹ Part A of the examination is developed by the FBOBE and consists of a combination of essay and multiple choice questions.⁴² Part B is the Multistate Bar Examination ("MBE") and is developed by the National Conference of Bar Examiners.⁴³

Part A is divided into six segments which must always include one segment on the Florida Rules of Civil and Criminal Procedure.⁴⁴ The

the court waived the requirements for law school graduation and submission to the Bar examination. *Id.* The court did impose conditions for the protection of the public should Mr. Hawkins decide to engage in the active practice of law. *Id.* at 639. Mr. Hawkins was later disciplined by the court for incompetence and misconduct and was ultimately allowed to resign from The Florida Bar in response to a misappropriation disciplinary action pending against him. *The Fla. Bar v. Hawkins*, 467 So. 2d 998 (Fla. 1985).

34. 236 So. 2d 767 (Fla. 1970).

35. *Id.* at 767-68.

36. *Id.* at 768.

37. *Id.*

38. *Id.*

39. *In re Russell*, 236 So. 2d at 768-69.

40. *Id.* at 769.

41. FLA. SUP. CT. BAR ADMISS. RULE, art. VI, § 4.

42. *Id.* § 1.a.

43. *Id.* §§ 1.a., 3.c.

44. *Id.* § 3.c.

remaining segments come from the following subjects: Florida Constitutional Law, Federal Constitutional Law, Business Entities, Wills and Administration of Estates, Trusts, Real Property, Evidence, Torts, Criminal Law, Contracts, Family Law and Chapters 4 and 5 of the Rules Regulating The Florida Bar.⁴⁵

The MBE consists of 200 multiple choice questions. It tests the following areas: Constitutional Law, Contracts, Criminal Law, Evidence, Real Property and Torts.⁴⁶

Currently, the court requires a scaled score of 131 or better on the Bar examination under the compensatory model or under the individual parts from different administrations.⁴⁷ Both parts of the General Bar Examination along with the Multistate Professional Responsibility Examination must be successfully completed within a period of twenty-five months or the older scores are deleted.⁴⁸ If not previously done, a Bar applicant must file an Application for Admission to The Florida Bar (which initiates the character and fitness background investigation) within 180 days of successfully completing the Bar examination.⁴⁹

Multiple calibrated readers are used to grade the essay answers “[t]o assure maximum uniformity in all grading.”⁵⁰ Calibration is achieved during a conference for the readers held the weekend following the Bar examination. Calibration is the method for aligning multiple readers to enable them to grade answers from the same essay question utilizing the

45. *Id.* Prior to 1988, Florida constitutional law had to be tested on each examination. In accepting the Board’s recommendation to move the subject of Florida constitutional law from the mandatory list to the discretionary list, the Florida Supreme Court stated:

The single comment filed in response to the publication criticized the removal of the mandatory requirement for testing Florida constitutional law separately on each Bar examination. We agree that it is important for Florida lawyers to have a knowledge of Florida constitutional law. However, we accept the representation of the Board that the proposed amendment would allow the Board greater flexibility in testing Florida constitutional law by permitting it to be included with another area on the same essay question, thereby producing higher quality questions on the subject.

In re Fla. Bd. of Bar Examiners re Amendment to Rules of Sup. Ct. of Fla. Relating to Admissions to the Bar, 524 So. 2d 643, 644 (Fla. 1988).

46. NATIONAL CONFERENCE OF BAR EXAMINERS, 1993 MBE INFORMATION BOOKLET (1992). The MBE is “designed to be answered by applying fundamental legal principles rather than local case or statutory law.” *Id.* at 2.

47. FLA. SUP. CT. BAR ADMISS. RULE, art. VI, § 7.

48. *Id.* § 9.a.

49. *Id.* § 9.b.

50. *Id.* § 7.b.

same grading criteria.

In Florida, unsuccessful examinees do not have the right to full review of their examination papers. This rule complies with controlling law in that Florida grants unsuccessful examinees the unlimited right to retake the examination:⁵¹ "The courts have held that if a state provides the unqualified opportunity to retake the Bar examination, no other type of hearing or review procedure is necessary to comply with due process."⁵²

III. REQUIREMENTS OF CHARACTER AND FITNESS

No person shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of Florida for admission to The Florida Bar unless such person first produces satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession and that such person is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.⁵³

In *Florida Board of Bar Examiners re G.W.L.*,⁵⁴ the Supreme Court of Florida confronted the issue of defining the phrase "good moral character."⁵⁵ The court concluded that good moral character should not be restricted to acts involving moral turpitude. Such a restricted definition "would not sufficiently protect the public interest."⁵⁶ After observing that "the unscrupulous attorney . . . [has] frequent opportunities to defraud the client or obstruct the judicial process," the Florida Supreme Court held that the appropriate standard of inquiry into good moral character should

51. See *Jones v. Board of Comm'rs of the Ala. State Bar*, 737 F.2d 996, 1005 n.1 (11th Cir. 1984) (Hatchett, J., dissenting); cf. *Tyler v. Vickery*, 517 F.2d 1089, 1103 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976) (discussing Georgia Bar Examination).

52. *Bailey v. Board of Law Examiners*, 508 F. Supp. 106, 110 (W.D. Tex. 1980). As observed by one court: "Even making the generous assumption that one out of every hundred applicants who take the examination fail when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is literally one in a million." *Tyler*, 517 F.2d at 1104.

53. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 2.a.

54. 364 So. 2d 454 (Fla. 1978).

55. *Id.* The historical understanding of moral turpitude was expressed in *State ex rel. Tullidge v. Hollingsworth*, 146 So. 660, 661 (Fla. 1933) as that which "involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society."

56. *G.W.L.*, 364 So. 2d at 458.

emphasize “honesty, fairness, and respect for the rights of others.”⁵⁷ The court has recognized “that the standard of conduct required of an applicant for admission to the Bar must have a rational connection to the applicant’s fitness to practice law.”⁵⁸

A. *Ineligibility*

The Supreme Court of Florida has imposed a judicial disability for a convicted felon who desires to practice law in Florida.⁵⁹ A convicted felon’s civil rights must be restored as “a necessary prerequisite to obtaining the privilege of practicing law.”⁶⁰ As the court has reasoned: “If one is ineligible to vote or hold public office in Florida, then he should not be eligible for admission to The Florida Bar and thereby become an officer of the courts of this State.”⁶¹

Additionally, disbarred attorneys from a foreign jurisdiction are ineligible for a minimum period of five years from the date of their disbarment.⁶² Suspended attorneys are also ineligible to seek admission until

57. *Id.* Justice Frankfurter expressed the legal profession’s demand for moral character among its members in the following language:

Certainly since the time of Edward I, through all the vicissitudes of seven centuries of Anglo-American history, the legal profession has played a role all its own. The Bar has not enjoyed prerogatives; it has been entrusted with anxious responsibilities. One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to “life, liberty and property” are in the professional keeping of lawyers. It is a fair characterization of the lawyer’s responsibility in our society that he stands “as a shield,” to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth— speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as “moral character.”

Schwartz v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

58. *G.W.L.*, 364 So. 2d at 458.

59. *See The Fla. Bar v. Clark*, 359 So. 2d 863 (Fla. 1978); *In re Fla. Bd. of Bar Examiners*, 183 So. 2d 688 (Fla. 1966).

60. *Clark*, 359 So. 2d at 864.

61. *In re Fla. Bd. of Bar Examiners*, 350 So. 2d 1072, 1073 (Fla. 1977).

62. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 2.f. The minimum five-year period of disqualification was selected to coincide with the disqualification period for disbarred Florida attorneys. *Florida Bd. of Bar Examiners re: Amendment to Rules of the Sup. Ct. of Fla. Relating to Admissions to the Bar*, 578 So. 2d 704, 707 (Fla. 1991). If a foreign jurisdiction indefinitely disbars an attorney, then such attorney will be prohibited from practicing law in Florida as long as the disbarment continues. *Florida Bd. of Bar Examiners*

the expiration of their period of suspension.⁶³ A person must be at least eighteen years of age to be recommended for admission to The Florida Bar.⁶⁴

B. Background Investigation

Without exception, the FBOBE "shall conduct an investigation and otherwise inquire into and determine the character, fitness and general qualifications of every applicant."⁶⁵ The FBOBE is authorized to obtain by subpoena such information as necessary to conduct a thorough investigation.⁶⁶

In conducting its investigation, the FBOBE uses an extensive program of contacting primary and secondary sources. An average of thirty-five to forty written inquiries are mailed out on each application. References, former employers, and secondary sources listed by the first two sources are among the individuals contacted. Follow-up contacts by letter or phone are routinely done for sources who fail to respond or who express a reluctance to respond fully. An absolute privilege is extended to communications from individuals solicited by the FBOBE regarding the character and fitness of a Bar applicant.⁶⁷

re R.L.V.H., 587 So. 2d 462 (Fla. 1991).

63. FLA. SUP. CT. BAR ADMISSIONS. RULE, art. III, § 2.g.

64. *Id.* § 2.c. On the one occasion for the requirement to be applicable, the Bar applicant had graduated from law school at age sixteen, had passed the Bar examination, and was qualified for admission at age seventeen. Upon the entry of a court order removing the applicant's disability of non-age, the FBOBE recommended, and the Florida Supreme Court granted, his admission.

65. *Id.* § 3.a.

66. *Id.*

67. *Dugas v. City of Harahan, La.*, 978 F.2d 193, 199 (5th Cir. 1992), *cert. denied sub nom. Bougere v. Ferrara*, 114 S. Ct. 60 (1993). In that case, Gary Bougere (a former Bar applicant) brought suit for defamation in federal district court in Louisiana against an individual who had responded to the Board's inquiries regarding Bougere's fitness to be a Florida attorney. Bougere eventually obtained a jury verdict awarding him \$75,000 in actual damages and \$25,000 in punitive damages. In reversing the judgment and holding that the communications to the Board were absolutely privileged, the United States Fifth Circuit Court of Appeals reasoned that if individuals responding to the Board's inquiry "were not absolutely immune from defamation liability for statements bearing upon a Bar applicant's character and fitness, they would shrink from the Board's request for such information. In that event, Florida's vitally important interest in ensuring an applicant's character and fitness would be thwarted." *Id.* at 198.

1. The Bar Application

The filing of the Application for Admission to The Florida Bar initiates the background investigation.⁶⁸ The application is currently thirteen pages and contains thirty-three inquiries, including questions regarding such matters as past residences, employment history, financial obligations, litigation, criminal arrests, and traffic violations.⁶⁹

The Bar application also elicits information concerning whether an applicant has ever been dependent upon drugs or alcohol or has ever obtained mental health treatment.⁷⁰ The constitutionality of the Board's inquiries into the area of an applicant's mental health survived a legal challenge based upon an applicant's claim of right of privacy.⁷¹

In upholding the use of mental health related questions, the Supreme Court of Florida reasoned:

It is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not otherwise be asked of persons not applying for a position of public trust and responsibility. Because of a lawyer's constant interaction with the public, a wide range of factors must be considered which would not customarily be considered in the licensing of tradesmen and businessmen. The inquiry into the applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder . . . furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.⁷²

The court further found that the use of such inquiry was the least intrusive

68. FLA. SUP. CT. BAR ADMISS. RULE, art. IV, § 6.

69. See Application for Admission to The Fla. Bar. Applicants who are admitted to practice in another jurisdiction are required to respond to several additional inquiries. *Id.*

70. See *id.* Regarding an applicant's mental and emotional fitness to practice law, the FBOBE recognizes the beneficial aspects of mental health treatment. A prelude to the mental health inquiries on the Bar application states in part: "The Board assures each applicant that the Supreme Court, consequent upon the Board's recommendation, regularly admits applicants with a history of both mental ill-health and utilization of the services of mental health professions The Board encourages applicants to seek the assistance of mental health professionals, if needed." *Id.*

71. Florida Bd. of Bar Examiners *re: Applicant*, 443 So. 2d 71 (Fla. 1983).

72. *Id.* at 75.

method to achieve Florida's compelling state interest of licensing only fit individuals in the practice of law.⁷³

2. Confidentiality

It is undisputed that the FBOBE gains access to highly sensitive information from disclosures by Bar applicants and from third parties. Information maintained by the FBOBE is actually the property of the Supreme Court of Florida.⁷⁴ The court has declared such information to be confidential except as otherwise authorized.⁷⁵

The desire to keep confidential the personal information supplied by a Bar applicant to the FBOBE is apparent. Such confidentiality hopefully encourages applicants to make full and fair disclosures of all information requested by the Bar application.

The need for confidentiality of information received from third party sources is essential if the FBOBE is to continue to conduct a thorough background investigation of Bar applicants. The Supreme Court of Florida recognized such need in its unanimous decision in *Florida Board of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*.⁷⁶

In that case, an interpretation was sought by the FBOBE in response to an order by the United States District Court for the Northern District of Florida requiring production by the FBOBE of confidential information and documents to a former Bar applicant.⁷⁷ The federal district court had interpreted a provision of the Florida Supreme Court's rule on confidentiality to authorize disclosure to a Bar applicant "any documents or exhibits which are before the Board and which are used by the Board at, or as a basis for, an investigative hearing."⁷⁸

In its decision, the Supreme Court of Florida expressly rejected the federal court's interpretation.⁷⁹ The court held that the FBOBE's raw investigative materials and staff prepared reports are not disclosable to a Bar

73. *Id.*

74. FLA. SUP. CT. BAR ADMISS. RULE, art I, § 14. The Board serves as the custodian of all the records on behalf of the Court. *Id.*

75. *Id.*

76. 581 So. 2d 895 (Fla. 1991).

77. *Id.* The underlying federal suit was brought by former Bar applicant Gary Bougere. See *supra* note 67.

78. *Florida Bd. of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*, 581 So. 2d at 896.

79. *Id.* at 897.

applicant. The court reasoned “that unless the board’s investigative files are held in confidence, many of those from whom the board seeks information concerning applicants would be unwilling to candidly respond.”⁸⁰

3. Truthfulness and Absolute Candor

Courts have recognized that honesty, truthfulness, and candor are essential qualities for individuals wishing to practice law. The Court of Appeals of Maryland observed that “no moral character qualification for Bar membership is more important than truthfulness and candor.”⁸¹ The Supreme Court of Delaware acknowledged that although “[g]ood moral character has many attributes, . . . none are more important than honesty and candor.”⁸² The Supreme Court of New Jersey enumerated the character traits required of each Bar applicant including “honesty and truthfulness, trustworthiness and reliability.”⁸³

Beginning in 1991, the Supreme Court of Florida has issued several published opinions which have emphasized the importance of an applicant’s duty to be truthful and candid with the Board.⁸⁴ As the court emphatically stated in one decision: “This Court will not tolerate a lack of candor from Bar applicants.”⁸⁵ A Bar applicant’s lack of veracity or candor is sufficient grounds to warrant denial of admission to The Florida Bar.⁸⁶

In addition to reflecting negatively upon a Bar applicant’s character and truthfulness, a lack of candor also adversely impacts the Board’s screening process. As observed by the Supreme Court of New Jersey in *In re Application of Jenkins*:⁸⁷

We believe that Jenkins’ pattern of nondisclosure evidences a serious lack of fitness to practice law. Jenkins’ actions go to the integrity of the admission system. If a candidate conceals the truth or misleads the

80. *Id.*

81. Application of Allan S., 387 A.2d 271, 275 (Md. 1978).

82. *In re Green*, 464 A.2d 881, 885 (Del. 1983) (emphasis added).

83. *In re Application of Matthews*, 462 A.2d 165, 174 (N.J. 1983).

84. See, e.g., Florida Bd. of Bar Examiners *re R.B.R.*, 609 So. 2d 1302 (Fla. 1992) [hereinafter *R.B.R.*]; *In re Florida Bd. of Bar Examiners re: J.A.F.*, 587 So. 2d 1309 (Fla. 1991) [hereinafter *J.A.F.*]; Florida Bd. of Bar Examiners *re J.H.K.*, 581 So. 2d 37 (Fla. 1991) [hereinafter *J.H.K.*]; Florida Bd. of Bar Examiners *re R.D.I.*, 581 So. 2d 27 (Fla. 1991) [hereinafter *R.D.I.*].

85. *R.B.R.*, 609 So. 2d at 1304.

86. *J.H.K.*, 581 So. 2d at 39 (“We further agree that the evidence of good character and rehabilitation presented by petitioner did not sufficiently offset his lack of veracity.”).

87. 467 A.2d 1084 (N.J. 1983).

Committee concerning events in his past that adversely affect his character, the process for reviewing candidates will collapse and no purpose will be served. The purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity of the Courts.⁸⁸

C. Formal Proceedings

After completing its investigation of a Bar applicant, which may include the applicant's appearance at an investigative hearing,⁸⁹ the Florida Board of Bar Examiners can either determine that the applicant has established the necessary qualifications for admission to The Florida Bar; that further investigation is necessary; or file specifications charging the applicant with matters that would preclude the applicant from admission to The Florida Bar.⁹⁰ "Specifications" is the term for the document which contains formal allegations of misconduct which, if proven, could result in an unfavorable recommendation by the Board.⁹¹

1. Formal Hearings

Applicants who have had specifications served upon them are entitled to a formal hearing before a panel of no less than five members of the FBOBE. Except with the applicant's consent, the hearing panel cannot include any member who previously participated in an investigative hearing for such applicant.⁹²

Formal hearings are adversary proceedings. Applicants appearing for a formal hearing are entitled to the following rights: representation by legal counsel, timely release of witness and exhibit lists by the FBOBE's attorney, access to the FBOBE's subpoena powers, cross-examination of witnesses called by the FBOBE's attorney, and presentation of witnesses and exhibits on the applicant's behalf.⁹³ The technical rules of evidence are not

88. *Id.* at 1090.

89. Investigative hearings are held before at least three members of the Board. Following an investigative hearing, the panel makes its recommendation to the full Board as to what action should be taken. FLA. SUP. CT. BAR ADMISSIONS. RULE, art. III, § 3.a.

90. *Id.* §§ 3.b.(1), (2), (3). See also *infra* notes 121-124 and accompanying text regarding conditional admissions.

91. FLA. SUP. CT. BAR ADMISSIONS. RULE, art III, § 3.b.(3).

92. *Id.* § 3.f.

93. See *Florida Bd. of Bar Examiners re: Interpretation of Article I, Section 14d of the Rules of the Supreme Court Relating to Admissions to the Bar*, 581 So. 2d at 897.

applicable to a formal hearing before the FBOBE.⁹⁴

Following the receipt of evidence and argument by the parties, the formal hearing panel enters its findings of fact and conclusions of law. The panel's decision must be based upon the evidence introduced into the record. In addition to recommendations for or against the applicant's admission, the panel may withhold its final decision for further evidence of rehabilitation⁹⁵ or petition the Supreme Court of Florida for additional time to conduct further investigation.⁹⁶

2. Burden of Proof

The controlling principles regarding the burden of proof in Bar admission proceedings were discussed by the court in *Coleman v. Watts*.⁹⁷ In that case, the FBOBE notified the applicant of its decision that "he did not meet the requirements for admission to The Florida Bar."⁹⁸ The Board's notice failed to specify any grounds for its unfavorable decision.

The *Coleman* court recognized the burden of Bar applicants to produce satisfactory evidence of their character and fitness. Once an applicant makes a prima facie showing, however, the burden of coming forward with evidence shifts to the FBOBE.⁹⁹

In holding that the procedure used by the FBOBE failed to provide due process, the *Coleman* Court held:

[I]t is incumbent upon the board to sustain its ruling by *record* evidence and not by mere assertions that it is possessed of confidential information which shows the applicant to be unfit; and if the record consists only of evidence supplied by the applicant, then such evidence must demonstrate that the board's dissatisfaction with his application rests on valid grounds and not upon mere suspicion.¹⁰⁰

Although its decision must be supported by record evidence, the FBOBE's findings need not be proven beyond a reasonable doubt.¹⁰¹ The

94. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 3.f.

95. *Id.* § 3.f.(4).

96. *Id.* § 3.g.

97. 81 So. 2d 650 (Fla. 1955).

98. *Id.* at 651.

99. *Id.* at 655.

100. *Id.*

101. Florida Bd. of Bar Examiners *re: L.K.D.*, 397 So. 2d 673, 675 (Fla. 1981) [hereinafter *L.K.D.*].

standard of proof for the Board often articulated by the Florida Supreme Court is one of “competent and substantial evidence.”¹⁰² As any other trier of fact, the Board may rely upon circumstantial evidence,¹⁰³ and may accept or reject the testimony of a witness or applicant.¹⁰⁴

3. Review by the Supreme Court of Florida

A Bar applicant who receives an unfavorable recommendation has a right of review by the Florida Supreme Court.¹⁰⁵ In conducting such review, the court is not precluded “from reviewing the factual underpinnings of [the FBOBE’s] recommendation, based on an independent review of the record developed at the hearings.”¹⁰⁶

The Court has also recognized differing standards applicable to Bar admission proceedings and disciplinary proceedings.¹⁰⁷ Thus, a Bar applicant is held to a higher standard of character and fitness than a practicing attorney.¹⁰⁸ Furthermore, denial of admission to The Florida Bar is not the same as disbarment.¹⁰⁹ After two years from the issuance of the Board’s recommendation, an applicant may reseek admission upon a showing of rehabilitation.¹¹⁰

4. Rehabilitation

In response to specifications, or when seeking readmission after having been previously denied, a Bar applicant is permitted to present evidence of rehabilitation.¹¹¹ Rehabilitative evidence is permissible to address the

102. See, e.g., *R.B.R.*, 609 So. 2d at 1304; *J.A.F.*, 587 So. 2d at 1311; Florida Bd. of Bar Examiners *re* H.H.S., 373 So. 2d 890, 892 (Fla. 1979) [hereinafter *H.H.S.*].

103. See, e.g., Florida Bd. of Bar Examiners *re* C.W.G., 617 So. 2d 303, 305 (Fla. 1993) [hereinafter *C.W.G.*]; *R.D.I.*, 581 So. 2d at 29.

104. See *R.D.I.*, 581 So. 2d at 30 (The court stated, “[T]he Board did not have to believe the petitioner’s version of events.”).

105. FLA. SUP. CT. BAR ADMISSIONS. RULE, art. III, § 4.b.

106. *L.K.D.*, 397 So. 2d at 675 (citations omitted).

107. *H.H.S.*, 373 So. 2d at 892.

108. *Id.*; Florida Bd. of Bar Examiners *re* Eimers, 358 So. 2d 7, 9 n.1 (Fla. 1978). For a discussion of the rationale for a higher standard for Bar applicants, see *Frasher v. West Virginia Board of Law Examiners*, 408 S.E.2d 675, 680 (W. Va. 1991).

109. *H.H.S.*, 373 So. 2d at 892.

110. See *C.W.G.*, 617 So. 2d at 305; *H.H.S.*, 373 So. 2d at 892; FLA. SUP. CT. BAR ADMISSIONS. RULE, art. III, § 4.d.

111. FLA. SUP. CT. BAR ADMISSIONS. RULE, art. III, § 4.e.

issue of “an applicant’s present fitness to practice law.”¹¹² Evidence of rehabilitation must be clear and convincing.¹¹³ As observed by the Supreme Court of Oregon:

[T]his court’s primary responsibility is to the public, to see that those who are admitted to the Bar have the sense of ethical responsibility and the maturity of character to withstand the many temptations which they will confront in the practice of law. If we are not convinced that an applicant can withstand these temptations, we would be remiss to admit the applicant. Doubt of consequence must be resolved in favor of the protection of the public.¹¹⁴

Florida provides Bar applicants with specific guidance on what is required to establish rehabilitation.¹¹⁵ Such requirements include positive contributions to society.¹¹⁶ “The requirement of positive action is appropriate for applicants for admission to the Bar because service to one’s community is an implied obligation of members of the Bar.”¹¹⁷

If the evidence of rehabilitation is convincing, then admission to the Bar is appropriate regardless of the seriousness of the past misconduct.¹¹⁸ Thus, a convicted drug dealer who has demonstrated full rehabilitation “should not be denied the privilege of practicing law solely because of a past mistake which is no longer relevant to the issue of his admission to the Bar.”¹¹⁹ However, as one court recognized: “[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.”¹²⁰

5. Conditional Admission

Alarmed by the growing number of applicants with psychiatric, drug and alcohol problems, the FBOBE undertook an in-depth study of this area during the spring and summer of 1985. The FBOBE sought and received professional advice from experts in the area of substance abuse. The

112. *Matthews*, 462 A.2d at 176.

113. FLA. SUP. CT. BAR ADMISS. RULE, art. III, § 4.e.

114. *In re Taylor*, 647 P.2d 462, 467 (Or. 1982).

115. FLA. SUP. CT BAR ADMISS. RULE, art. III, § 4.e.

116. *See id.* § 4.e.(7).

117. *Id.*

118. *See, e.g., In re Diez-Arguelles*, 401 So. 2d 1347, 1350 (Fla. 1981).

119. *Id.*

120. *Matthews*, 462 A.2d at 176.

FBOBE's efforts culminated in February, 1986 with the submission of a proposed rule change for the court's consideration.

The FBOBE's proposal sought approval from the court to establish a program of conditional admission to the Bar for applicants with a history of alcohol or drug abuse, or a history of a serious psychological disorder. In support of its proposal, the Board reasoned in part:

In dealing with applicants who have experienced drug or alcohol-related problems or serious psychological disorders, the Board must be conscious of both the rights of the individual applicant and the protection of the public interest. Unrestricted admission of such an applicant can have catastrophic consequences. A client's legal affairs, funds and even personal liberty are all jeopardized by the actions of an impaired attorney. However, the wholesale denial of applicants with these problems is not an acceptable solution.¹²¹

After requesting and subsequently receiving a mutually agreeable proposal from the FBOBE and The Florida Bar, the Supreme Court of Florida approved the conditional program on December 4, 1986.¹²² Since 1985, after recommendations by FBOBE, the court has approved over 135 confidential conditional admissions.¹²³

Florida has led the country with its progressive program of conditional admission. As observed by the Chair of the National Conference of Bar Examiners: "It is time that appropriate Bar admission authorities in other states recognize the need for conditional licensing."¹²⁴

IV. CONCLUSION

The Bar admissions process in Florida is not static. Members of the FBOBE are appointed for terms of limited duration to insure that "new views" will be presented to and considered by the full membership on a continuing basis.¹²⁵ The inclusion of public members on the FBOBE has

121. Pet. of FBOBE for Amend. of the R., Exhibit "A" at 4, February 13, 1986, Sup. Ct. of Fla. Case No. 68,307.

122. *In re Florida Bd. of Bar Examiner for Amendment of the Rules of the Sup. Ct. of Fla. Relating to Admission to the Bar*, 498 So. 2d 914 (Fla. 1986).

123. For a discussion of the appropriate sanction for an attorney who violates the terms of her conditional admission, see *The Florida Bar v. Roberts*, 626 So. 2d 658 (Fla. 1993).

124. Stuart Duhl, *Letter from the Chair*, B. EXAMINER, Feb. 1992, at 3.

125. FLA. SUP. CT. BAR ADMISSIONS RULE, art. I, § 3.b.

expanded such views to include the perspective of the nonlawyer. The new views of the Supreme Court of Florida and the FBOBE are reflected in the investigative and adjudicatory functions pertaining to a Bar applicant's character and fitness. Thus, the past issue of an applicant's sexual orientation has been relegated to an institutional memory.¹²⁶

Other issues such as alcoholism, drug addiction, and mental illness are no longer overlooked or minimized, but are "directly confronted" through reasonable inquiries, professional evaluations, and conditional admissions.¹²⁷ While the old issues of honesty, truthfulness, and candor have been clarified and re-emphasized,¹²⁸ the relatively new issue of financial responsibility continues to evolve.¹²⁹

On the horizon, new issues await consideration by the Florida Supreme Court and the FBOBE. Due to advances in technology, computer testing for professional licensure is quickly becoming a reality. It appears the question is no longer *if*, but *when*, as to the development of a computer adaptive version of the Bar examination. A proposal has also been made by the former president of the American Bar Association which would permit law students to sit for the Bar examination.¹³⁰

Throughout these changing times, the Florida Supreme Court and the FBOBE will continue to fulfill their "constitutional responsibility to protect the public by taking necessary action to ensure that the individuals who are admitted to practice law will be honest and fair and will not thwart the

126. Florida Bd. of Bar Examiners *re* N.R.S., 403 So. 2d 1315, 1317 (Fla. 1981) (The court stated "[P]rivate noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law."). See also *Eimers*, 358 So. 2d at 9.

127. See *supra* notes 121-126 and accompanying text. In *The Fla. Bar v. Larkin*, 420 So. 2d 1080, 1081 (Fla. 1982), the Florida Supreme Court "directly confronted" the issue of alcoholism among the Bar's membership:

Too often, attorneys will recognize that a colleague suffers from alcohol abuse, but will ignore the problem because they do not want to hurt the individual or his or her family. This attitude can have disastrous results both for the public and for the individual attorney. If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This court has responsibility to assure that the public is fully protected from attorney misconduct.

Id.

128. See *R.B.R.*, 609 So. 2d at 1302; *J.A.F.*, 587 So. 2d at 1309; *J.H.K.*, 581 So. 2d at 37; *R.D.I.*, 581 So. 2d at 27; see also *supra* text accompanying notes 81-88.

129. See, e.g., Florida Bd. of Bar Examiners *re* S.M.D., 609 So. 2d 1309 (Fla. 1992).

130. Talbot D'Alemberte, *Remarks*. B. EXAMINER, Aug. 1992, at 28.

administration of justice.”¹³¹ As stated on the seal of the FBOBE:
“*Clemens iustitiae custodia.*”¹³²

131. *G.W.L.*, 364 So. 2d at 458.

132. Closely translated, the Latin phrase means: “Compassionate and vigilant protection of justice.”